

AZMAN KASRI & ANOR.

v.

MD. ISA ENDUT & GOVT. OF MALAYSIA

HIGH COURT MALAYA, MUAR

EUSOFF CHIN J

[CIVIL SUIT NO. 271 OF 1982]

22 NOVEMBER 1987

CIVIL PROCEDURE: *Adjournment - Counsel, defendant & witness absent - Fourth time in Court - Judge proceeded - Order made - Discretion of Court.*

DAMAGES: *Left leg amputated above knee - Skin grafting - Scar - Loss of future earnings - Artificial limb - Consumptive items - Food taken - Interest.*

The first plaintiff, a student aged 14 (at time of accident) was knocked down from the rear by a military truck driven by the first defendant at about 4.45 p.m. on 11 February 1982 while cycling. Injuries are briefly described as (a) Crush injury of left leg (b) 6 inches laceration wound vertical exposing the lower end of left femur and upper end of left tibia and fibula (c) Dislocation of left knee with separation (d) Lateral popliteal nerve partially torn near neck of left fibula. Left leg was subsequently amputated above the knee. The 2nd plaintiff is the mother of the victim.

The hearing was fixed on 10 September 1986 and was subsequently adjourned 3 times. At the 4th time in Court, Federal Counsel, defendant and his witnesses were absent. The Court proceeded and assessed the damages. An application by the defendant to set aside the award of Damages was dismissed. The defendants appealed against the order dismissing their application to set aside the judgment, and also against the amount of damages awarded.

Held:

[1] The conduct and the intended acts alleged by the Counsel for defendant show no good or reasonable cause as to why the Judge could not proceed to assess the damages.

[2] In assessing pain & suffering for the first plaintiff, the fact that the first plaintiff had refused amputation was taken into consideration when assessing the award even though the amended defence did not plead failure to mitigate damages on part of the first plaintiff.

[3] The award is as follows:

General Damages for First plaintiff

Injuries and damages for First plaintiff

- | | |
|---|----------|
| 1. Pain and suffering due to the nature of injuries to his left leg prior to amputation of the left leg | RM12,000 |
| 2. Amputation of left leg above the knee | RM45,000 |
| 3. Skin grafting and resultant scar | RM10,000 |
| 4. Loss of future earnings at the rate of RM240 per month with a multiplier of 24 years | RM39,740 |

Special Damages for First plaintiff

- | | |
|--|-----------|
| 5. Cost for fitting artificial limb and for the future | RM 33,600 |
| 6. Cost for future renewal of consumptive items | RM 20,640 |

- a** 7. Travelling expenses for servicing of artificial limb
(3 trips per year at RM100 per trip for 35 years) RM 10,500
RM171,480

Interest at 6% per annum on general damages from date of accident to date of judgment.

- b** *Special Damages for 2nd Plaintiff*
1. Transport expenses to visit First plaintiff in hospital RM1,720
 2. Out-patient Treatment RM 480
 3. Nourishing food taken by First plaintiff RM 100
- c** RM2,300

Interest at rate of 3% per annum on RM2,300 from date of accident to date of trial.

[Order accordingly.]

Cases referred to:

- d** *Go Pak Hoong Tractor and Building Construction v. Syarikat Pasir Perdana* [1982] 1 MLJ 77
Goh Beng Seng v. Dol bin Dollah [1970] 2 MLJ 95
Tham Meng Fatt v. Utam Singh Omnibus Co. Ltd. [1982] 2 MLJ 355
Thangavelu v. Chia Kok Bin [1981] 2 MLJ 277
R.J. Mc Guinness v. Ahmad Zaini [1980] 2 MLJ 304
Paramasivan & Anor. v. Abdul Aziz and Ors. [1976] 2 MLJ 91
Jamaliah bt. Mohmad v. Ng Fook Seng [1982] 2 MLJ xlvi
- e** *For the plaintiff - E. Ramasamy, M/s. E. Ramasamy & Co.*
For the defendant - FC

JUDGMENT

Eusoff Chin J:

- f** On 10 September 1986 when this case was set for hearing; both the Counsel for the plaintiffs, Mr. E. Ramasamy and Federal Counsel Puan Suraya for the defendants requested for time to settle the case. The Court adjourned the hearing to 14 January 1987.
- On 14 January 1987 the same Counsels asked for another adjournment since the 1st plaintiff's injured left leg might have to be amputated. Puan Suraya for the defendants admitted 100% liability. The case was adjourned to 6 July 1987.
- g** On 6 July 1987, the Court heard evidence for assessment of damages. 2 witness gave evidence. Mr. E. Ramasamy was Counsel for the plaintiffs, Puan Suraya was for the defendants. The case was adjourned for continued hearing on 17 August 1987.
- h** On 17 August 1987, the plaintiffs, their witness and Mr. E. Ramasamy were present. The defendant, his witnesses and Federal Counsel Suraya were absent. The other cases fixed for hearing on that day had been settled. The Court waited till 11.30 a.m. to give time to the Federal Counsel Puan Suraya or any other Federal Counsel to come from Kuala Lumpur. There had been no application received by the Court from the Federal Counsel by letter, telephone or telegram requesting for any adjournment. At 11.30 a.m. the Court proceeded to hear evidence of the 6 witnesses for the plaintiffs, and at the close of it, I assessed damages to be paid to the plaintiffs by the defendants.
- i**

In *Go Pak Hoong Tractor & Building Construction v. Syarikat Pasir Perdana* [1982] 1 MLJ 77, the defendants and their solicitors were absent on the date the case was fixed for hearing. The plaintiff's solicitors produced a telegram which read "Defendant fell sick. Unable to attend Court tomorrow. Have applied postponement of hearing. Kindly mention for us as Counsel in charge unable to obtain seat to fly to Kota Bharu. Letter follows." The Court nevertheless refused the adjournment, and judgment in default was entered against the defendants. On appeal, the Federal Court held that:

The granting of an adjournment is in the absolute discretion of the Court depending on the facts of each case. Unless it can be shown that the discretion was improperly exercised it should not be disturbed. The facts of the present case clearly show a lackadaisical attitude towards lawyers' duty to their clients and their duty to the Courts.

Federal Counsel Mary Lim Thiam Suan applied to set aside the award of damages I made against the defendants on 17 August 1987. I heard this application on 19 August 1987. The reasons given by Mary Lim Thiam Suan by affidavit in support of her application are:

1. that Puan Suraya the Federal Counsel handling the case had gone on one year no pay leave effective from 1 August 1987, and that the cases handled by her were being reassigned to other officers;
2. that this case was not listed in the civil division of the Attorney General's hearing list;
3. that no officer had been assigned to take over her post, and therefore no one in the civil division knew of the date of the continued hearing of this case in Muar;
4. that the defendants intended to dispute the evidence and the awards made by the Court;
5. that the defendants intended to call one Dr. Yap Hin Wai to testify that plaintiff had initially refused amputation of his left leg.

I had dismissed the application to set aside the order made on 17 August 1987 on the ground that there was no good or reasonable cause shown why I should do so because:

1. Puan Suraya was in Court on 6 July 1987 when the case was adjourned to 17 August 1987 for continued hearing. She had, up to the time she went on leave on 1 August 1987, 25 days during which she could have informed her head of civil division of the date for the continued hearing of this case on 17 August 1987, or to pass the relevant file to another officer or to have this case listed in her Division's hearing list;
2. The Court should not concern itself whether between 1 August 1987 to 17 August 1987 another officer had or had not been assigned to take over the files handled by Puan Suraya;
3. On 19 August 1987, Mary Lim Thiam Suan had orally informed me that in fact another officer had been assigned to do the continued hearing of this case, but that this officer had overlooked the date of the continued hearing of this case. She had not said so in her affidavit in support of her application to set aside the order;
4. I do not believe that the defendants had the genuine intention of calling Dr. Yap Hin Wai to give evidence since I had perused the relevant civil suit Court file and there had never been an application made by the defence for a subpoena to be issued to this doctor to come to Court to give evidence for the defence.

The amended defence did not plead that the plaintiff had failed to mitigate his damages by agreeing to early amputation of his leg, nor was the plaintiff cross-examined by Puan Suraya on this point on 6 July 1987 - *Goh Beng Seng v. Dol bin Dollah* [1970] 2 MLJ 95.

a In any event the fact that the 1st plaintiff had refused amputation is clearly stated in the medical report signed by this doctor, at p. 1 of the supplementary bundle of documents filed by the plaintiffs themselves, and I had taken this fact into consideration when assessing the award for pains and suffering for the 1st plaintiff.

b The defendants filed an appeal against the order dismissing their application to set aside the judgment. The reasons for the dismissal had been given above.

The defendants had also appealed against the amount of damages awarded to the plaintiffs. It is not disputed that on 11 February 1982 at about 4.45 p.m. while the 1st plaintiff (Azman) was cycling along the road in Jementah town, he was knocked down from the rear by a military truck No. Z 7705 driven by the 1st defendant. The plaintiff was admitted to Segamat District Hospital. The medical report on the 1st plaintiff issued by the Segamat District Hospital dated 9 August 1982 stated:

- c**
- Injuries:
1. Crush injury of left leg - open wound extending horizontally across the medial aspect of the knee to the patella 4 inches.
 - d** 2. 6 inches lacerated wound vertical exposing the lower end of left femur and upper end of left tibia and fibula.
 3. Dislocation of left knee with separation of the medial epiphysis.
 4. Lateral popliteal nerve partially torn near the neck of left fibula grossly.

e **Done:** Desloughing of the contaminated wound with reduction and application of the POP by surgeon under general anaesthesia. The necessary treatment was given.

The wound turned septic and since there was no Surgeon here, the patient was referred to Muar Hospital for further management on 18 February 1982.

The Muar district Hospital report dated 14 October 1982, on the plaintiff stated:

f The patient was admitted to the Muar District Hospital on 18 February 1982 at 7.55 p.m. after an alleged motor vehicle accident. On examination, his general condition was satisfactory. He was conscious and rational. The following injuries were sustained on his person.

A compound comminuted fracture of the upper end of the left tibia with the compound dislocation of the left knee joint and necrosis of skin and muscles.

He was given the necessary treatment and discharged on 17 March 1982.

g The plaintiff was sent to Melaka General Hospital on 17 March 1982, and the medical report dated 28 September 1982 stated:

The abovenamed was transferred to orthopaedic unit, Hospital Besar Melaka on 17 March 1982 for further management of injuries sustained in a road traffic accident.

He had received initial treatment at Segamat and Muar district hospitals.

h Examination at Melaka revealed a heavily infected crush injury left lower limb with circumferential skin loss extending from left knee to about 4 inches above left ankle.

He also had a left footdrop and soft tissue contracture.

The left knee was disrupted.

i Patient had an external stabilisation done on 20 March 1982 followed by skin grafting on 25 March 1982.

Post-operative period was rather stormy but patient recovered satisfactorily and was discharged on 24 August 1982 with advice to follow up at orthopaedic clinic.

a

On 24 January 1987 the 1st plaintiff's left leg was amputated above the knee. The Muar District Hospital medical report dated 13 June 1987 stated:

The abovenamed was referred from Segamat following an alleged motor vehicle accident 1 week prior to admission (he was admitted to Segamat on 11 February 1982). No loss of consciousness was sustained.

b

His injuries were:

1. Compound fracture (L) tibia and extensive soft tissue necrosis.
2. Dislocation of (L) knee joint (compound).

Treatment given included:

c

1. Wound debridement on 19 February 1982.
2. Reduction of dislocation and application of POP slab 27 February 1982. Following this, the patient developed septicaemia but refused amputation.
3. A salvage operation was done on 10 March 1982 (as patient refused amputation). - (L) knee arthrodesis and muscle rotation flap.

d

Despite the operation the patient's condition did not improve making amputation mandatory. He was then referred to Malacca G.H. on 17 March 1982 for further management (left above knee amputation).

Apparently no amputation was done in Melaka and the patient was conservatively managed. He was readmitted to us on 17 January 1987 with a grossly deformed and lymph oedematous (L) leg.

e

An above knee amputation was then carried out on 24 January 1987. Postoperatively, he developed osteomyelitis of the stump and sequestrectomy was done on 11 April 1987. Despite this, pus discharge continued and he was seen by the consultant orthopaedic surgeon whose impression was chronic osteomyelitis. He was discharged on 4 May 1987 with long term antibiotics and daily dressing.

f

He was readmitted again for the third time on 17 May 1987 complaining of pus discharge from wound. He was treated with appropriate antibiotics according to culture and is presently still in the ward for dressing.

sgd.,

...
Dr. Yap Hin Wai
Pegawai Perubatan,
Hospital Daerah,
Muar.

g

For pain and suffering, the plaintiff's Counsel cited 2 cases:

1. *Tham Meng Fatt v. Utam Singh Omnibus Co. Ltd.* [1982] 2 MLJ 355, where a 7 year old infant died, 9 years later from hip injuries after a fall from a bus, and the Court awarded RM65,000 for pain and suffering.
2. *Thangavelu v. Chia Kok Bin* [1981] 2 MLJ 277 where the Court awarded RM20,000 for pain and suffering to the plaintiff, a 13 year old boy who suffered head injury and in a state of coma, responding only to deep pain, and died about one year later.

h

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a In this case the 1st plaintiff would not have undergone 5 years of pain and suffering had he agreed to early amputation of his left leg. It cannot be denied that he had suffered pain and suffering due to the nature of the injuries to his left leg. In the circumstances, I consider it reasonable to award to the 1st plaintiff RM12,000 damages for pain and suffering.

b For the amputation of the 1st plaintiff's left leg above the knee, the general trend is to award between RM40,000 and RM50,000 general damages for loss of a leg from above the knee. The plaintiff's Counsel submitted that RM50,000 should be a fair amount, citing *R.J. Mc Guinness v. Ahmad Zaini* [1980] 2 MLJ p. 304, I consider RM45,000 as fair and reasonable.

c For the skin grafting and resulting scar, 27 cm. x 30 cm. on the right thigh with areas of keloid information, the plaintiff's Counsel cited the case of *Paramasivan & Anor. v. Abdul Aziz and Ors.* [1976] 2 MLJ 91 and *Jamaliah bt. Mohamad v. Ng Fook Seng* [1982] 2 MLJ xlviii and asked for RM15,000. Considering that the plaintiffs in the two cases cited suffered more than the plaintiff in the present case as regards skin grafting and keloid formation, I awarded the 1st plaintiff RM10,000 damages under this head.

d The evidence of PW6, 7, and 8 show that a contract labourer working as a weeder, rubber tapper or a shop assistant would be earning between RM350 to RM500 p.m. The 1st plaintiff in his present condition would not be able to do any of these jobs as his other school friends were doing. I would estimate that if not for his amputated left leg, he would be able to work as a rubber tapper or weeder in an estate and he earning about RM400 per month. However, the First schedule of the Workmens' Compensation Ordinance, 1952 states that the loss of earning capacity of a worker for loss of a leg above the knees would be 60%. I would therefore consider that the 1st plaintiff's loss of earning capacity to be 60% of RM400 which is RM240 per month. He is 20 years old at the date of trial of this case.

e I would therefore give him a multiplier of 24 years ($55 - 20 = 35 \times 2/3$), and using the actuary tables gives RM39,740 as loss of future earnings.

f PW2 who was a manager of a company selling artificial limbs gave evidence, and was cross-examined by the defence Counsel on 6 July 1987. PW3 a prosthetic and orthopaedic technician supported PW3's evidence. According to them a cheap and reliable artificial limb to be fitted to 1st plaintiff whose left leg had been amputated above the knee would be the one manufactured in Taiwan. It costs RM5,570, and would last for about 5 years if properly used. Consumptive items needed replacements. On the evidence I found that to reach 55 years, the plaintiff would need 6 changes of artificial limb for his left leg, and each would cost about RM4,800. I therefore awarded to first plaintiff $7 \times \text{RM}4,800 = \text{RM}33,600$ as cost of fitting artificial limb. The cost for renewal of consumptive items for that period to be RM20,640.

g To function properly, the artificial limb need to be serviced regularly, at least 3 times a year, and the plaintiff has to travel to Kuala Lumpur to do this. Each trip from Jementah to Kuala Lumpur would cost the plaintiff RM100 which is $\text{RM}100 \times 3 = \text{RM}300$ per year, and for 35 years it comes to RM10,500.

To sum up, award to the 1st plaintiff are as follows:

h A. General Damages.

- | | | |
|---|---|-----------|
| 1. For pain and suffering for a period of 5 years | - | RM 12,000 |
| 2. Amputation of left leg above knee | - | RM 45,000 |
| 3. Permanent scars on right thigh | - | RM 10,000 |

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|--|-------------|----------|
| 4. Future earnings at RM400 per month.
Reduced to 60% of this = RM240 per month.
RM240 as loss of earning capacity. Now 20
years old - 24 years multiplier. On the A/table: | - RM 39,740 | a |
| 5. Cost of fitting artificial left leg (prothesis). | | |
| a. Till 55 years of age - 1st fitting + 6 changes
required (7 x 4,800) | - RM 33,600 | b |
| b. Renewals of consumptive items - RM20,640 a+b
(as per Exhibit P2). | - RM 54,240 | |
| c. Travelling expenses for servicing of limb at
Kuala Lumpur - 3 trips per year at 100 per trip
- RM300 x 35 years | - RM 10,500 | c |
| Total award to 1st plaintiff | = RM171,480 | |

Interest at 6% per annum from date of accident to date of judgment on items 1, 2 and 3, and no interest on items No. 4 and 5 above.

For the 2nd plaintiff, who was the mother of the 1st plaintiff, on the evidence adduced, I made the following awards on special damages only although the 2nd plaintiff was unable to produce receipts for taxi or bus fares:

- | | |
|---|----------|
| 1. Transport expenses incurred by the 2nd plaintiff to visit the 1st plaintiff with plaintiff's family members while plaintiff was in Segamat hospital (11 February 1982 to 18 February 1982) for 7 days at RM10 bus fare per return trip from Jementah - RM70. | e |
| 2. Transport expenses incurred by the 2nd plaintiff to visit the 1st plaintiff with plaintiff's family members while plaintiff was in Muar Hospital (18 February 1982 to 17 March 1982) for 30 days at RM15 bus fare per return trip from Jementah - RM450. | |
| 3. Transport expenses incurred by the 2nd plaintiff to visit the 1st plaintiff with plaintiff's family members while plaintiff was in Melaka Hospital (17 March 1982 to 24 August 1982) for 60 days at RM20 bus fare per return trip for Jementah - RM1,200 | f |
| 4. For 1st plaintiff's outpatient treatment at Melaka Hospital - amount spent by 2nd defendant to take 1st plaintiff there 3 trips per week for 4 weeks - RM40 per return trip by taxi - 12 x RM40 - RM480. | |
| 5. 2nd plaintiff's expenses to buy nourishing foods for 1st plaintiff while in hospital which 2nd plaintiff claimed to be only RM100 - RM100 | g |

Total: RM2,300

I also ordered interest at 3% per annum on the RM2,300 to be paid to the 2nd plaintiff from date of accident to date of trial.

Also found at [1988] 2 CLJ 743

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